A

Public Prosecutor v Sigol bin Singki

B HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO SDK-42JSK H-4/8 OF 2020
CELESTINA STUEL GALID J
27 APRIL 2021

C *Criminal Law — Sexual offences — Sexual offences against child — Sentencing — Accused pleaded guilty — Sentenced to six years imprisonment and two strokes of whipping for each offence — Whether the court considered the enhanced penalty provision under s 16 of the Sexual Offences Against Children Act — Whether the sentence passed correct in law — Sexual Offences Against Children Act 2017 ss 14(a) & 16(1) — Criminal Procedure Code s 288(1)*

D

There were seven appeals by the prosecution against the decision of the sessions court in relation to the sentence passed on the accused who pleaded guilty to 21 charges under s 14(a) read with s 16(1) of the Sexual Offences Against Children Act 2017. The accused was a 61 year old stepfather to the victim who was 16 years old at the time of the charges. The sessions court sentenced the accused to six years imprisonment for each of the charges to run concurrently and two strokes each of the said charges totaling to 42 strokes. Counsel for the respondent submitted that the imprisonment terms were within the range of the trend of sentencing and that the accused being a first time offender was 61 years old and that he had pleaded guilty and thereby saved the court's time and expense. The learned deputy public prosecutor urged the court to vary the sentence contending that they should run consecutively instead as the offences in the 21 charges were not committed in one and the same transaction and that there were aggravating factors which ought to have been considered namely that the accused threatened to slap the victim if she informed anyone about the sexual assault and that she had been sexually assaulted since she was ten years old.

E

F

G

H **Held**:

(1) The reduction of the imprisonment term on account of the guilty plea by the accused and or his status as a first offender had been reflected in the sentence imposed by the sessions court. In any event, a guilty plea does not automatically entitle an offender to a discount (see para 6).

I

(2) Section16 of the Act clearly provides for an enhanced penalty in addition to the applicable punishment under the Act if the relationship between the offender and victim is of trust as defined under s 2(a)–(f) thereunder and the relationship between the accused and the victim fell within this

definition. The sessions court was thus bound to separately consider s 14(a) of the Act before further considering what was applicable enhanced penalty under s 16(1) of the Act. However, nowhere in the grounds of judgment of the sessions court did the court consider the significance of the enhanced penalty under s 16(1) of the Act and immediately imposed the sentence without any discussion as to what was the applicable sentence under s 14 and what was the added penalty imposed under s 16. This amounted to a misdirection of law which warranted appellate intervention (see paras 13–16).

(3) The court was inclined to agree with the submissions by learned DPP that the sentence imposed by the sessions court was not reflective of the seriousness of the offences committed by the accused. In the circumstances, the sentence was enhanced to eight years imprisonment to run concurrently in each of the charges and to take effect from the date of the accused's arrest. The additional two years was imposed pursuant to s 16(1) of the Act. This said, ordering consecutive sentences for the offences would not be logical, as that would mean imposing a sentence of 168 years jail on the accused (see paras 22–24).

(4) Section 288(1) of the Criminal Procedure Codecapped the number of strokes to only 24. Given this provision, the court would confirm the punishment of two strokes each under the 21 charges, but capped the number of strokes at 24. Whilst the court was aware of the futility of imposing the 24 strokes given the age of the accused, the sentence needs to be pronounced to emphasise the deterrence and the seriousness of the offence. The accused must also undergo counselling during the period of his detention, and be subjected to police supervision for a period of two years after the expiration of the sentence passed on him (see paras 27–29).

[Bahasa Malaysia summary

Wujud tujuh rayuan oleh pendakwaan terhadap keputusan mahkamah sesyen berkaitan dengan hukuman yang dikenakan kepada tertuduh yang telah mengaku salah kepada 21 pertuduhan dibawah s 14(a) dibaca bersama s 16(1) Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017. Tertuduh merupakan bapa tiri yang berusia 61 tahun kepada mangsa yang berusia 16 tahun pada waktu pertuduhan, mahkamah sesyen menjatuhkan hukuman enam tahun pemenjaraan kepada tertuduh untuk setiap satu pertuduhan yang berjalan secara serentak dan dua sebatan untuk setiap satu pertuduhan yang terjumlah kepada 42 sebatan. Peguam responden menghujahkan bahawa tempoh pemenjaraan adalah dalam lingkungan dan trend hukuman dan tertuduh yang merupakan pesalah kali pertama berusia 61 tahun dan dia telah mengaku salah dan oleh yang demikian telah menjimatkan masa dan perbelanjaan mahkamah. Timbalan pendakwa raya menggesa mahkamah untuk mengubah hukuman dan menghujahkan bahawa ianya sepatutnya berjalan secara berasingan kerana kesalahan dalam 21 pertuduhan tersebut tidak dilakukan

dalam satu transaksi yang sama dan wujud faktor pemberatan yang sepatutnya dipertimbangkan iaitu tertuduh mengugut untuk menampar mangsa sekiranya dia memberitahu sesiapa mengenai serangan seksual dan bahawa dia telah diserang secara seksual sejak dia berusia sepuluh tahun.

Diputuskan:

(1) Pengurangan tempoh pemenjaraan atas sebab pengakuan salah tertuduh dan atau statusnya sebagai seorang pesalah kali pertama boleh di lihat daripada hukuman yang dijatuhkan oleh mahkamah sesyen. Dalam apa keadaan sekalipun, satu pengakuan salah tidak secara automatilk melayakkan pesalah kepada sat pengurangan (lihat perenggan 6).

(2) Seksyen 16 Akta secara jelas memberikan peruntukan kepada penalti yang lebih berat sebagai tambahan kepada hukuman yang terpakai dibawah akta sekiranya hubungan antara pesalah dan mangsa adalah berdasarkan kepercayaan sepertimana yang ditafsirkan dalam s 2(a)–(f) dan hubungan antara tertuduh dan mangsa terjatuh dibawah definisi ini. Oleh itu, mahkamah sesyen perlu mengambil kira secara berasingan s 14(a) Akta tersebut sebelum menimbangkan apa hukuman lebih berat yang terpakai dibawah s 16(1) Akta tersebut. Namun, tiada di mana-mana dalam alasan penghakiman mahkamah sesyen yang menunjukkan mahkamah sesyen mengambil kira kepentingan hukuman lebih berat dibawah s 16(1) Akta tersebut dan secara terus mengenakan hukuman tanpa apa-apa perbincangan mengenai apakah hukuman yang terpakai dibawah s 14 dan apa hukuman lebih berat yang dikenakan dibawah s 16. Ini terjumlah kepada salah arah undang-undang yang memerlukan campur tangan rayuan (lihat perenggan 13–16).

(3) Mahkamah bersetuju dengan hujahan TPR terpelajar bahawa hukuman yang dikenakan oleh mahkamah sesyen tidak menggambarkan keseriusan kesalahan yang dilakukan oleh tertuduh, dalam keadaan ini, hukuman telah ditingkatkan kepada lapan tahun pemenjaraan yang berjalan secara serentak untuk semua pertuduhan yang bermula daripada tarikh tangkapan tertuduh. Dua tahun tambahan yang dikenakan adalah selaras dengan s 16(1) Akta tersebut. Memerintahkan hukuman secara berturutan untuk kesalahan tersebut tidak masuk akal kerana ianya bermaksud mengenakan hukuman penjara selama 168 tahun kepada tertuduh (lihat perenggan 22–24).

(4) Seksyen 288(1) Kanun Tatacara Jenayah meletakkan had bilangan sebatan kepada 24. Mengambil kira peruntukan ini, mahkamah mengesahkan hukuman dua sebatan untuk setiap satu daripada 21 pertuduhan, tetapi menghadkan bilangan sebatan kepada 24. Manakala, mahkamah sedar kesia-siaan mengenakan 24 sebatan mengambil kira usia tertuduh, hukuman harus dikenakan untuk menegaskan pencegahan dan keseriusan kesalahan. Tertuduh juga perlu menjalani

kaunseling sewaktu tempoh tahanannya, dan dikenakan pengawasan polis untuk tempoh dua tahun selepas hukuman yang dikenakan terhadapnya luput (lihat perenggan 27–29).]

Cases referred to

Muhammad Isa bin Aris & Ors v PP [2011] 5 MLJ 342, CA (folld)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)
PP v Mohd Tajuddin bin Ahmad [1996] MLJU 354; [1997] 1 CLJ Supp 384, HC (refd)
PP v Ravindran [1993] 1 MLJ 45, HC (refd)
PP v Salwani Thaleb [2009] 2 MLJ 723, CA (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70, HC (refd)
PP v Yahaya Selaman [2006] 2 MLJ 475, HC (folld)
Tuan Mat bin Tuan Lonik v PP [2009] 4 MLJ 81, CA (refd)

Legislation referred to

Criminal Procedure Code ss 288(1), 316(b)(ii)
Sexual Offences Against Children Act 2017 ss 14, 14(a), 16, 16(1), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), 25, 26(1), 27(1)

Hamido Ambo (Ambo & Co) for the appellant.
Mark Kenneth Netto (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Celestina Stuel Galid J:

INTRODUCTION

[1] There are seven appeals by the prosecution against the decision of the sessions court in sentencing the accused who pleaded guilty to 21 charges under s 14(a) read with s 16(1) of the Sexual Offences Against Children Act 2017 ('the Act'). The accused who was 61 years old was the stepfather of the victim who was 16 years of age at the time of the charges.

[2] The sessions court had sentenced the accused to six years imprisonment term for each of the charges to run concurrently and two strokes each of the said charges, thereby totalling 42 strokes.

THIS COURT'S DECISION

[3] It is trite law that the discretion on sentencing belongs to the trial court. The appellate court is consistently reminded that it should not disturb that discretion but for limited circumstances — see *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869. The exercise of the appellate intervention extends to where the sentence imposed by the lower court is

A inadequate — see *Public Prosecutor v Salwani Thaleb* [2009] 2 MLJ 723.

[4] Additionally, the court was guided by what Abdul Malik Ishak JCA stated in *Muhammad Isa bin Aris & Ors v Public Prosecutor* [2011] 5 MLJ 342 that:

B

> Public interest features prominently in sentencing an accused person. Indeed this is the approach adopted by this court in *Tan Sri Rahim bin Mohd Noor v Public Prosecutor* [2001] 3 MLJ 1 at p 4; [2001] 4 CLJ 9 at p 13, where Shaik Daud JCA had this to say:
>
> C
>
> > It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest
> D
> of justice must also include the interest of the community. In assessing sentence, the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be of the uppermost consideration.

E **[5]** Learned counsel who appeared for Yayasan Bantuan Guaman Kebajikan ('YBGK') for the accused submitted that this court ought not to disturb the sessions court's decision, that the imprisonment terms were within the range of the trend of sentencing, that the accused, a first time offender was 61 years old and that he had pleaded guilty thereby saving the court's time and expense.

F

[6] To my mind, the reduction of the imprisonment term on account of the guilty plea by the accused and or his status as a first offender had been reflected in the sentence imposed by the sessions court. As will be seen in [19] below, the accused was facing imprisonment term of not exceeding 25 years. In any event,
G a guilty plea does not automatically entitle an offender to a discount — see *Public Prosecutor v Ravindran* [1993] 1 MLJ 45.

[7] As for the fact that the accused was of 61 years old, this court was guided by what the court had stated in *Public Prosecutor v Yahaya Selaman* [2006] 2
H MLJ 475:

> The magistrate had taken into account the age and the respondent's health in reducing the sentence. When committing the said offence, respondent himself realised his health but was still willing to commit the offence. Therefore, the
> I
> respondent, by right, should experience the punishment meted out for the offence committed from the point of law. If old age and health reasons are accepted as an ingredient to light punishment, the court will give a wrong description to the public that old and aged people are given special treatment if found convicted. By right, old age will make one more matured as regards thinking power and experience (see para 9).

> The respondent is not a teenager whom the court could accept as immature as regards thinking power and experience. The court can give consideration on the wrongdoings of teenagers in order to give them an opportunity to correct their behaviour and to return to society with the help to change their lifestyle and destroy criminal violence. But for one who has exceeded sixty years, if at that age, the respondent commits an offence, moreover a cruel one, the rehabilitation factor will be too late to be taken into account and the immature thinking consideration may not be used (see para 10).

[8] Likewise, in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, the court stated that:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.

[9] Learned deputy public prosecutor ('DPP') has urged this court to vary the sentence contending that they should run consecutively instead as the offences in the 21 charges were not committed in one and the same transaction.

[10] It was further submitted that there were aggravating factors which ought to have been considered by the sessions court, namely that the accused had threatened to slap the victim if she informed anyone about the sexual assault, that based on her statement the victim had been sexually assaulted since when she was ten years old.

[11] Section 14(a) of the Act provides that:

> Any person who, for sexual purposes —
>
> (a) touches any part of the body of a child;
>
> commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be liable to whipping.

[12] Under s 16(1) of the Act,

> If a person who commits any offence under this Act or any offence specified in the Schedule against a child, is in a relationship of trust with the child, such person shall, *in addition to the punishment to which he is liable for such offence,* be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less than two strokes. (Emphasis added.)

A **[13]** Section 16(1) of the Act clearly provides for an enhanced penalty in addition to the applicable punishment under the Act if the relationship between the offender and the victim is of trust as defined under sub-s (2)(a)–(f) thereunder. Such 'relationship of trust' includes that of a relative through marriage with a child if the child is under his care, supervision or authority. The
B relationship between the accused and the victim fell within this definition.

[14] To my mind, the sessions court was thus bound to separately consider s 14(a) of the Act before further considering what was the applicable enhanced
C penalty under s 16(1) of the Act.

[15] However, nowhere in the grounds of judgment of the sessions court did the court consider the significance of the enhanced penalty under s 16(1) of the Act. The sessions court immediately imposed the concurrent six year
D imprisonment term without any discussion as to what was the applicable sentence under s 14 and what was the added penalty imposed under s 16. This court was left guessing as to whether the mandatory enhanced penalty under s 16(1) of the Act was in fact even considered.

E **[16]** This court was of the respectful view that this amounted to a misdirection of law which warranted this court's appellate intervention as it does not promote the law for the court to merely pay a lip service to the applicable provisions without actually giving effect to it.

F **[17]** There was a reason why s 16 was enacted and it was to show the law's abhorrence to offenders who abuse their position of trust to sexually assault the child victim. This fact could be gathered from what was reported in the Hansard 'Rang Undang-Undang Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017' (see DR.03.04.2017 at p 46) where the minister, Dato' Hj
G Abdul Rahman bin Mohamad (Lipis) when debating on the Bill stated that in the ten years alone, the sexual offenders against children involved biological fathers (23.9%), stepfathers (23%), uncles (18.7%), biological brothers (12.5%), cousins (7.2%), brother-in-laws (5.3%), stepbrothers (4%), grandfathers (1.6%) and stepgrandfathers (1%).

H

[18] The said minister was further recorded to have stated:

> Oleh sebab itu data yang dikumpulkan ini adalah tergolong daripada kenalan itu sendiri, maknanya ahli keluarga itu sendiri. Oleh sebab itu bila saya mendengar
I hujahan daripada rakan-rakan sebentar tadi untuk menarik perhatian bahawa kita kena memainkan peranan di sekeliling keadaan persekitaran kita, jiran-jiran kita, kita kena melihat apakah keadaan sebenar jiran-jiran kita itu. Akan tetapi perkara yang berlaku ini adalah disebabkan berlaku di dalam rumah itu sendiri. Kadang-kadang mereka tinggal di rumah kampung atau rumah bandar itu sendiri yang jaraknya jauh daripada orang ramai.

> Bagaimana kita nak melihat perkara ini berlaku, sebab dia berlaku dalam rumah dia. Kalau sebagai seorang yang kita katakan tadi mahram dia sendiri dia lakukan perkara itu. Bagaimana kita nak mengesan setelah dia melakukan perkara tersebut, maka sudah pastilah dia juga melakukan ugutan terhadap mangsa itu sendiri. Jadi kita mengharapkan supaya apa yang berlaku ini, kita hendaklah akui bahawa kanak-kanak ini sering terdedah dalam keadaan bahaya di kalangan anggota ahli keluarganya sendiri yang kita boleh anggap sebagai musang berbulu ayam ataupun haruan makan anak itu sendiri.
>
> Dalam konteks penderaan kepada kanak-kanak ini, kebanyakan kes penderaan seksual terhadap kanak-kanak ini laporan biasanya lambat dibuat sebab yang saya katakan adalah disebabkan kena ugutan daripada ahli keluarga sendiri. Kadang-kadang kita sedar sehingga kanak-kanak ini telah mengandung, baru kita sedar ada perubahan berlaku pada kanak-kanak ini barulah kita mengambil keputusan untuk membuat laporan polis.
>
> Kadang-kadang kita tidak membuat laporan polis kerana kita memikirkan ini adalah ahli keluarga kita sendiri melakukan. Kalau bapa dia sendiri atau bapa tirinya atau sebagainya, dia menganggapkan bahawa satu mata pencarian akan hilang kalau mereka melakukan laporan tersebut. Maka inilah yang hendak kita bayangi dengan perubahan daripada akta-akta ini maka mungkin juga kita boleh serba sedikit mencegah daripada perkara yang berlaku itu, sebagaimana yang saya katakan lebih berbelas ribu kes berlaku sehingga Oktober 2016.

[19] In this respect, it must be noted that while s 14 already provides for imprisonment term of not exceeding 20 years, when read with s 16, the imprisonment term is increased to not exceeding 25 years. This clearly indicates that Parliament recognised the vulnerability of victims to persons who are in relationship of trust with them. Respectfully, it would be contrary to public interest to not give effect to the provision when dealing with cases of such nature.

[20] Reverting to the present case, the accused had pled guilty to sexual assaults of either 'menyentuh buah dada dan kemaluan', '11 menyentuh buah dada' or '11 menyentuh kemaluan'. Based on the facts of the case (exh 'P1') which were admitted by the accused, the accused had threatened to slap the victim at one time and at another, masturbated whilst sexually assaulting the victim. These were committed when the accused was able to get the victim alone in the house they were living in and in one occasion, in a car.

[21] It could not be understated that the accused was able to do so because of his position as the victim's stepfather. Unlike the proverbial bogeyman waiting to pounce on his victim, because of his position, the accused was free to accost the victim as and when it suited him. Thus, to not give effect to s 16 would be to completely ignore the significance of this fact.

A CONCLUSION

[22] Given all of the above, this court was inclined to agree with the submissions by learned DPP that the sentence imposed by the sessions court was not reflective of the seriousness of the offences committed by the accused. This was a fit and proper case for an appellate intervention.

[23] The court therefore exercised its power under s 316(b)(ii) of the CPC and varied the imprisonment term from six years to run concurrently in each of the 21 charges to eight years imprisonment to run concurrently in each of the charges to take effect from the date of arrest on 15 July 2020. For clarity, the additional two years was imposed pursuant to s 16(1) of the Act.

[24] As for the submission by the prosecution that the order that the sentences be made to run consecutively, if granted, it would have meant the accused having to serve a total of 168 years for the 21 charges. Given that the accused was 61 years old, it would have meant that he would be 229 years old by the time the total consecutive sentences of 168 years were served — this was the kind of 'illogical sentence' that the Court of Appeal in *Tuan Mat bin Tuan Lonik v Public Prosecutor* [2009] 4 MLJ 81 cautioned against and to which this court readily agreed. The court therefore disagreed with the prosecution's submission that the sentence should run consecutively.

ON THE NUMBER OF STROKES OF WHIPPING IMPOSED

[25] The words 'shall also be punished with whipping' in s 16(1) of the Act mandates two strokes of whipping upon conviction — see *Public Prosecutor v Mohd Tajuddin bin Ahmad* [1996] MLJU 354; [1997] 1 CLJ Supp 384. This is notwithstanding the discretion (to not impose whipping) under s 25 of the Act for offenders above 50 years of age.

[26] In the present case, the accused had pleaded guilty and was convicted of 21 charges for offences under s 14(a) and read with s 16(1) of the Act. The total number of strokes came up to 42 strokes.

[27] Section 288(1) of the CPC however, caps the number of strokes to 24 only. Given this provision, the order of the sessions court that the accused be punished with two strokes each under the 21 charges was maintained but this court clarified that the sentence was to be meted out in compliance with s 288(1) of the CPC ie for a maximum number of 24 strokes only.

[28] In so ordering, much like the court in *Tuan Mat bin Tuan Lonik*, this court was aware of the futility of the imposition of the 24 strokes given the age of the accused. However, this court was of the view that the sentence serves as

a deterrent and reminder to not only the accused but would be offenders as to the seriousness of the offence.

ADDITIONAL ORDERS

[29] In addition, this court made the following orders:

(a) an order pursuant to s 26(1) of the Act that the accused underwent a rehabilitative counselling within the period of his detention; and

(b) an order pursuant to s 27(1) of the Act that the accused be subjected to police supervision for a period of two years commencing immediately after the expiration of the sentence passed on him.

Order accordingly.

Reported by Izzat Fauzan